

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF HAWAII

WAYNE BERRY, a Hawaii citizen;	)	CIVIL NO. CV03-00385 SOM-LEK
	)	(Copyright)
Plaintiff,	)	
vs.	)	<b>DECLARATION OF LEX R. SMITH</b>
	)	
HAWAIIAN EXPRESS SERVICE,	)	
INC., et al.,	)	
	)	
Defendants.	)	
	)	
	)	
	)	

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DECLARATION OF LEX R. SMITH

1. I am an attorney licensed to practice law before all of the State and Federal Courts in the State of Hawaii and am one of the attorneys representing Defendant C&S Wholesale Grocers, C&S Acquisition LLC, C&S Logistics LLC, ES3 LLC and Richard Cohen in this case.

2. Attached hereto as Exhibit "A" are true copies of pages from the March 2002 deposition of Mark Dillon.

3. Attached hereto as Exhibit "B" are true copies of pages from the trial transcript dated February 28, 2003 containing the testimony of Mr. Ralph Stussi in Mr. Berry's lawsuit against Fleming.

4. Attached hereto as Exhibit "C" is a true and correct copy of the Court's January 25, 2005 Order.

5. Attached hereto as Exhibit "D" are true copies of pages from the trial transcript in the instant action dated March 1, 2006 and reflecting trial testimony of Mr. Brian Christensen.

6. In December of 2004, I was present at the deposition of Brian Christensen in this case when he testified that he became Hawaii Division President in March of 2003. I did not recall that thirty-two months earlier (in March of 2002) Tim Hogan, Wayne Berry and I were all present at a deposition in which Mr. Mark Dillon testified that Brian Christensen was the boss at Fleming's Kapolei offices. Apparently Mr. Hogan and Mr. Berry also did not recall Mr. Dillon's testimony.

7. I also did not recall that the bills which I produced to Mr. Hogan in 2003 reflected that they were addressed to Brian Christensen beginning in 2002. Apparently Mr. Hogan also forgot this fact.

8. To the best of my recollection, I had very little contact with Mr. Christensen regarding the first Wayne Berry copyright lawsuit. My contacts at Fleming for dealing with the case that went to trial in 2003 were Ralph Stussi and Fleming lawyers in Oklahoma City and Houston Texas. Ralph Stussi attended the trial in March of 2003 as Fleming's representative.

DATED: Honolulu, Hawaii, May 17, 2006.

A handwritten signature in black ink, appearing to read 'Lex R. Smith', written over a horizontal line.

LEX R. SMITH